Supreme Court, U.S.
FILED
NOV 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-585

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN PALMA and LINCOLN HOUSING AUTHORITY,
PETITIONERS,

v.

AMY ADLER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

MARTIN W. AISENBERG
Counsel of Record for Respondent
JONES & AISENBERG
72 South Main Street
Providence, Rhode Island 02903
(401) 274-4446

JOSEPH F. PENZA, JR.
OLENN & PENZA
1246 Chalkstone Avenue
Providence, Rhode Island 02908
(410) 351-5200

Blanchard Press, Inc., Boston, Mass.—Law Printers [617] 426-6690

I

QUESTIONS PRESENTED

1. Should the petition for certiorari be dismissed for want of jurisdiction because the decision of the Rhode Island Supreme Court, which reversed a directed verdict for petitioners (defendants below) and remanded the case for a new trial, is not a final judgment or decree as required by 28 U.S.C. § 1257?

2. Did the Rhode Island Supreme Court correctly rule that the trial judge had violated the standard for assessing the evidence on a motion for a directed verdict, had erroneously viewed the evidence in the light least favorable to the respondent (plaintiff below), had improperly drawn inferences against respondent, and, consequently, that he had erred in granting petitioners' motion for a directed verdict on respondent's civil rights claims?

3. Did the Rhode Island Supreme Court correctly hold that when respondent, an employee of petitioner Lincoln Housing Authority, reported to the chairman of the authority's board of commissioners her observations of malfeasance by the authority's executive director, petitioner Palma, including his appropriation of public funds and equipment for his personal use, her statements constituted speech on a matter of public concern?

4. Did the Rhode Island Supreme Court correctly hold that the petitioner housing authority could be held liable under 42 U.S.C. § 1983 for ratifying petitioner Palma's termination of respondent's employment, on the ground that such ratification constituted an act of official policy?

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Statement of the Case	2
Reason Why the Petition Should be Denied	6
I. The Decision of the Rhode Island Supreme Court Is Not a Final Judgment or Decree and Therefore Is Not Reviewable in This Court	6
II. The Rhode Island Supreme Court Correctly Ruled That the Trial Judge Violated the Standard for Assessing the Evidence on a Motion for a Directed Verdict	13
III. Respondent's Speech Obviously Addressed a Matter of Public Concern	15
IV. The Lincoln Housing Authority Is Liable Under 42 U.S.C. § 1983 for Ratifying Palma's Decision to Terminate Respondent's Employment	17
Conclusion	20

Table of Citations

Cases:

Bitgood v. *Allstate Insurance Co.*, 481 A.2d 1001 (R.I. 1984) 13

City of St. Louis v. *Praprotnik*, 108 S. Ct. 915 (1988) 18, 19

Connick v. *Myers*, 461 U.S. 146 (1983) 15

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 6, 7, 8, 9, 10, 11, 12

Espinoza v. *O'Dell*, 633 P.2d 455 (Colo. 1981) 12

Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) 16

Page

Goldstein v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984) 13n
Greminger v. *Seaborne*, 584 F.2d 275 (8th Cir. 1978) 17
Hornyak v. *Pomfret School*, 783 F.2d 284 (1st Cir. 1986). 13n
Lemieux v. *Leonard Construction Co.*, 73 R.I. 338, 58 A.2d 625 (1947) 10
McNeese v. *Board of Education*, 373 U.S. 668 (1963) 19
Montuori v. *Narragansett Electric Co.*, 418 A.2d 5 (R.I. 1980) 13
Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1976) 7, 9
O'Dell v. *Espinoza*, *cert. granted*, 454 U.S. 1122 (1981), *dismissed for want of jurisdiction*, 456 U.S. 430 (1982) 12, 13
Pembaur v. *City of Cincinnati*, 475 U.S. 469 (1986) 17, 18, 19
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 8
Rankin v. *McPherson*, 107 S. Ct. 2891 (1987) 15, 16
San Diego Gas & Electric Co. v. *City of San Diego*, 450 U.S. 621 (1981) 7
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) 19
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 19
Zwickler v. *Koota*, 389 U.S. 241 (1967) 19

Constitutional Provisions:

United States Constitution,
First Amendment 12, 14, 16

Statutes:

28 U.S.C. §1257 ..... 1, 2, 6
§1257(3) 1
42 U.S.C. §1983 ..... 1, 2, 3, 6, 12, 17, 18
§1985 ..... 2, 3, 6, 12

Miscellaneous:

Page

Annot., 29 L. Ed. 2d 872 (1972) 6

Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004 (1978) 7, 8, 9, 10, 11

In the
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-585

JOHN PALMA and LINCOLN HOUSING AUTHORITY,
PETITIONERS,

v.

AMY ADLER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Opinions Below

The trial judge's decision was rendered from the bench and is not reported. The opinion of the Rhode Island Supreme Court is reported *sub nom. Adler* v. *Lincoln Housing Authority*, 544 A.2d 576 (R.I. 1988).

Jurisdiction

Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257(3). However, the Rhode Island Supreme Court did not

render a "final judgment or decree," which is necessary to vest jurisdiction in this Court under § 1257; rather, it reversed the judgment that had been entered on a directed verdict for petitioners and remanded the case to the superior court for a new trial. Respondent therefore submits that the petition for certiorari should be dismissed for want of jurisdiction.

Statute Involved

Respondent concurs with petitioners' statement under this heading.

Statement of the Case

The respondent, Amy Adler, brought this action in state court under 42 U.S.C. §§ 1983 and 1985, as well as under Rhode Island common law. The complaint alleged that petitioners — the Lincoln Housing Authority and its executive director, John Palma — had terminated respondent's employment with the housing authority in violation of her constitutional right to freedom of speech on matters of public concern. The case was tried to a jury. At the conclusion of respondent's case, the trial judge granted petitioners' motion for a directed verdict on all counts.

On appeal, the Rhode Island Supreme Court reversed the judgment and remanded the case for a new trial on the § 1983 claims. The court held that the trial judge had erroneously viewed the evidence in the light most favorable to petitioners and had improperly drawn inferences in their favor; that respondent's speech addressed a matter of public concern and therefore was constitutionally protected; and that the authority's ratification of Palma's decision to terminate respondent was an act of official policy for which the authority could be held liable under § 1983. Respondent did not appeal the trial judge's dismissal of her state law claim for intentional inflic-

tion of emotional distress (544 A.2d at 579 n.2, App. at 23a n.2); nor does she challenge in this Court the Rhode Island Supreme Court's rejection of her conspiracy claim under 42 U.S.C. § 1985 (544 A.2d at 582, App. at 30a-31a). Thus, the only issue before this Court (apart from its jurisdiction, which respondent contends is lacking in this case) is whether the Rhode Island Supreme Court correctly reversed the directed verdict on respondent's § 1983 claims.

Petitioners' statement of the case is highly misleading, both procedurally and factually, because it ignores the posture in which this case reached the Rhode Island Supreme Court and, consequently, the posture in which it reaches this Court. Nowhere do petitioners acknowledge that the court below remanded this case to the nisi prius court for a new trial. The words "directed verdict" do not appear in the petition; nor do petitioners bother to mention either the duty of a trial judge when ruling on a motion for a directed verdict or the standard of review on appeal of a directed verdict. To the contrary, the petition leaves the distinct impression that the trial judge was the finder of fact (Pet. at 9, 11) and that the Rhode Island Supreme Court, "reading from a 'cold record' and not having the opportunity to see the witnesses" (Pet. at 11), improperly rejected his factual findings. Nothing could be farther from the truth; a jury was the trier of fact in this case, and it was the trial judge, not the supreme court, who improperly invaded the province of the factfinder. Thus, petitioners' statement of "facts," which for the most part either paraphrases or repeats verbatim the trial judge's "findings," is fatally flawed.

The evidence, viewed in the light most favorable to respondent and with all reasonable inferences drawn in her favor, establishes the facts set forth in the opinion of the Rhode Island Supreme Court (544 A.2d at 578-80, App. at 21a-26a). Briefly, those facts are as follows.

The Lincoln Housing Authority is a governmental agency created by the Rhode Island Legislature to take advantage of

federally funded housing programs. In January 1981 petitioner Palma, the authority's executive director, hired respondent for a position entitled "secretary/bookkeeper and leased housing manager." Her duties included administration of the federal section 8 housing program. She worked in an office with Palma and the assistant executive director, Carol Kennedy.

Working relations in the office grew strained when Kennedy refused Palma's request that she help resolve a personal problem between Palma and his girlfriend, who was a former employee of the authority and friend of Kennedy's. Kennedy reported this to the chairman of the authority's board of commissioners, and in June 1981 the board met to discuss the matter. The next day, Palma, Kennedy and respondent met with the chairman and vice-chairman of the board. "[Respondent] and Kennedy were directed to report any future intra-office problems to Palma first, who in turn would contact the commissioners upon request." (544 A.2d at 578, App. at 21a.)

Thereafter, relations between Palma and Kennedy grew steadily worse, and Palma began to direct his anger toward respondent as well. Beginning in October 1981, respondent maintained written records regarding Palma's behavior. Her motive was to document that she and Kennedy were often forced to take official action on Palma's behalf because of his excessive absence from the office. Respondent also observed that Palma was using the authority's office as his personal residence[1] and that he was using the authority's trucks and gasoline credit cards for his personal needs. Respondent also "believed that Palma was improperly ignoring regulations concerning the priority of applicants for section-8 housing and that because of his actions the tenants were being deprived of benefits intended for recipients of federal assistance." (544 A.2d at 578, App. at 21a-22a.)

---

[1] Petitioners claim that the office "had apartment facilities" (Pet. at 4). There is no evidence in the record to support this assertion; to the contrary, respondent and Kennedy both testified that they would arrive at work in the morning to find Palma asleep *in their office* on a rollaway bed.

Respondent apprised the chairman of the board of commissioners of Palma's activities.[2] As a result, the entire board met with Palma on January 7, 1982 to discuss respondent's complaints. Palma admitted using the authority's office as his personal residence for over 3 months, using an authority truck to move his own furniture, and using an authority credit card to buy fuel for the truck while on personal business.[3] He made restitution to the authority for his use of the credit card and offered to reimburse the authority for making the office his home.

> Subsequently, personnel relations worsened, and on February 2, 1982, defendant Palma, through Kennedy, informed plaintiff that she was no longer responsible for administering section-8 housing. In response plaintiff approached Palma and inquired about his decision to change her duties. Palma replied that he owed her no explanation. The plaintiff asked to file a grievance, and Palma replied that the request was denied. The plaintiff questioned Palma's authority to deny her the right to file a grievance, and he replied that if she questioned his authority, she was fired. [544 A.2d at 578, App. at 22a.]

---

[2] The chairman at that time was respondent's father. The trial judge's repeated, sarcastic references to this fact

> indicate[] that [he] attached negative inferences in making his determination. The fact that plaintiff's father was chairman is irrelevant. . . . Because the board is vested with the ultimate control over the housing authority, clearly plaintiff's only available recourse was to alert those authorities about Palma's alleged felonious activities. Undoubtedly, plaintiff would have contacted the board whether her father was a member or not.

544 A.2d at 579-80, App. at 24a-25a. Moreover, petitioners' statement that Palma and respondent's father had been engaged in a public dispute "just before this time" (Pet. at 5) is incorrect; in fact, that dispute took place approximately 4 years before the events narrated herein. Again, the trial judge improperly drew a negative inference from the long-ago dispute between Palma and respondent's father (App. at 8a).

[3] Palma admitted all this at trial. It is not clear from the record what, if anything, he admitted to the commissioners at the meeting of January 7, 1982.

Respondent contacted one of the commissioners, who instructed her to submit a written grievance to the board. She did so, providing a copy to Palma. Three days later, Palma handed her a letter stating that her employment was terminated. Subsequently, after a hearing held at respondent's request, the board of commissioners sustained Palma's decision.

As previously noted, the trial judge entered judgment on a directed verdict in favor of petitioners. The Rhode Island Supreme Court affirmed in part (on the § 1985 claim) and reversed in part (on the § 1983 claims) and ordered the case "remanded for further proceedings consistent with this opinion" — *i.e.*, a new trial on the § 1983 claims. (544 A.2d at 582, App. at 31a.)

Reasons Why the Petition Should Be Denied

I. The Decision of the Rhode Island Supreme Court Is Not a Final Judgment or Decree and Therefore Is Not Reviewable in This Court.

This Court's jurisdiction to review state court decisions by way of either appeal or certiorari is governed by 28 U.S.C. § 1257, which limits that jurisdiction to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." When, as here, a state appellate court remands a case to a nisi prius court for trial on the merits, its decision is not final and therefore is not ordinarily reviewable under § 1257. Annot., 29 L. Ed. 2d 872, 883-87 (1972) (citing many cases).

Nevertheless, the finality requirement of § 1257 has not been applied in a mechanical or strictly literal fashion; rather, the Court has taken a pragmatic approach, recognizing that there are circumstances justifying a departure from the rule of finality. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469

(1975), the Court "elaborated a conceptual scheme of four discrete categories to encompass its prior decisions permitting an exception to the rule of finality and presumably to serve as a guide for future applications of section 1257." Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004, 1005 (1978) (hereinafter "Finality Note").[4] This case does not fall into any of the *Cox* exceptions to the rule of finality, and the petition should therefore be dismissed for want of jurisdiction.

The first of the *Cox* exceptions applies "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 479. In this situation "the federal claim to be reviewed on interlocutory appeal is, as a practical matter, conclusive of the case because the party asserting the claim has no other grounds upon which to rest his claim." Finality Note, 91 Harv. L. Rev. at 1015 (footnote omitted). In the instant case, the Rhode Island Supreme Court has held that respondent's speech addressed a matter of public concern and therefore was constitutionally protected. However, respondent still must persuade a jury that her constitutionally protected conduct was a substantial or motivating factor in her termination. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1976). Furthermore, the jury will be permitted to find in petitioners' favor if

---

[4] The notewriter concludes that three of the four categories identified in *Cox*

> create difficulties both because their imprecision leads to a disturbing unpredictability in application and, more importantly, because their content rests upon premises that diverge from the assumption that underlies the "entire case" paradigm — that as a general rule, the benefits of interlocutory appeals in the individual case are to be sacrificed for the systemic benefit gained by predicating appellate jurisdiction upon finality.

Finality Note, 91 Harv. L. Rev. at 1026. *See also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 501-12 (Rehnquist, J., dissenting); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 633-36 (1981) (Rehnquist, J., concurring).

petitioners can show by a preponderance of the evidence that they would have fired respondent even in the absence of her protected conduct. *Id.* Thus, the decision below is not dispositive of this litigation, the case is not "for all practical purposes concluded," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 479, and it therefore does not fall into the first *Cox* category.

The second category consists of cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480.[5] An example cited by the Court in *Cox* is *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945):

> In *Radio Station WOW*, the Nebraska Supreme Court directed the transfer of the properties of a federally licensed radio station and ordered an accounting, rejecting the claim that the transfer order would interfere with the federal license. The federal issue was held reviewable here despite the pending accounting on the "presumption . . . that the federal questions that could come here have been adjudicated by the State court, and that *the accounting which remains to be taken could not remotely give rise to a federal question . . . that may later come here . . . .*"

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. at 480, *quoting Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. at 127 (emphasis added). Thus, "[b]y definition, if the Court accepts such a case for interlocutory review, it will not have to reconsider the case at a later date *because the predicate to the exception is that no federal issues remain to be raised.*" Finality Note, 91 Harv. L. Rev. at 1019 (emphasis added; footnote omitted).

---

[5] The Harvard notewriter suggests that a better explanation of the Court's willingness to review cases in this category is that the petitioner would have suffered irreparable injury before final judgment. Finality Note, 91 Harv. L. Rev. at 1017-18.

This exception does not apply here, because federal issues remain to be raised in this case. As noted above, at retrial respondent must meet the burdens of production and persuasion imposed by the *Mt. Healthy* case, 429 U.S. at 287, and petitioners are free to attempt the affirmative defense established in that case, *id.* These are federal issues, and their resolution by the trial judge, the jury, and ultimately the Rhode Island Supreme Court on appeal, will be reviewable in this Court after final judgment. In fact, there are no state law issues left in this case, because respondent did not appeal the trial judge's dismissal of her state law claim for intentional infliction of emotional distress. This is now a pure § 1983 action, indistinguishable from a similar case tried in a federal district court. In such a case, "the likelihood that other federal questions will be raised in the course of the proceedings creates a substantial possibility of delay from multiple appeals." Finality Note, 91 Harv. L. Rev. at 1019 n.85. Consequently, this case does not fit into *Cox* category 2.

Furthermore, the other requisite of category 2 also is not met here, because the Rhode Island Supreme Court has not "finally" decided whether respondent's speech is constitutionally protected:

> It is to be borne in mind that such conclusions of law as we stated in the original opinion were conditioned, so to speak, by *the status of the case at that time when only the plaintiff's evidence was before us.* When the case is fully tried defendants conceivably may be able to present evidence which will remove several *inferences favorable to the plaintiff which we were required to draw on the record before us.*
>
> *In the event of such an altered factual situation* defendants would not be foreclosed by such conclusions of law as we laid down in the original opinion based upon different facts.

Lemieux v. *Leonard Construction Co.*, 73 R.I. 338, 350, 58 A.2d 625, 625-26 (1947) (emphasis added). Respondent hastens to add that she does not believe that at retrial petitioners will be able to establish "an altered factual situation" which would justify a change in the Rhode Island Supreme Court's holding that her speech addressed a matter of public concern. The fact remains, however, that the Rhode Island Supreme Court cannot *finally* determine that issue until it is presented with a complete record — *i.e.*, a record that includes petitioners' evidence as well as repondent's.

Category 3 comprises cases in which

> the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. at 481.[6] There are three reasons why the case at bar does not fall into this category. First, as demonstrated above, the federal claim has not been "finally" decided. Second, if petitioners ultimately prevail on the merits, the federal issue will not be mooted; all of the issues in this case are federal issues, and all of them would be reviewable on respondent's appeal to the Rhode Island Supreme Court, should the verdict go against her at retrial. Third, if petitioners lose the second trial, they will be able to appeal to the Rhode Island Supreme Court and obtain review of their defenses on the whole record.

---

[6] The Harvard notewriter criticizes this category as being fundamentally inconsistent with the independent and adequate state grounds doctrine. Finality Note, 91 Harv. L. Rev. at 1021-23.

The fourth and last of the *Cox* exceptions involves

> those situations where the federal issue has been finally decided in the state courts *with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issues by this Court*, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . . In these circumstances, *if a refusal immediately to review the state court decision might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been *finally* determined by the state courts for purposes of the state litigation.

Id. at 482-83 (empahsis added).[7] Here, as previously noted, the federal issues have not been finally determined by the state courts. Moreover, there are no nonfederal grounds upon which petitioners may ultimately prevail on the merits, because there are no nonfederal issues left in this case. Finally, a refusal of piecemeal review will not erode federal policy; to

---

[7] This category has been criticized as being "formless," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 507 (Rehnquist, J., dissenting), and "susceptible of virtually limitless expansion," Finality Note, 91 Harv. L. Rev. at 1025 (footnote omitted). Moreover,

> the imprecise manner in which the scope of the category is defined invites litigants to seek review in all cases in which even arguably significant federal rights are asserted. . . . Even if the Court denies review of many of these interlocutory orders, the unpredictability of the exception disrupts the state court proceedings in general and forces the Court itself to evaluate an increased number of petitions for interlocutory review, thereby nullifying the efficiency of the finality principle.

Id., at 1025-26. The instant petition demonstrates that this is not an unfounded concern. This case, which was placed on the superior court's trial calendar at the beginning of September so that the retrial could be scheduled, has been continued indefinitely at petitioners' request until this Court rules on the petition. This delay works substantial hardship on respondent.

the contrary, the Rhode Island Supreme Court has upheld federal policy, as set forth in the First Amendment, 42 U.S.C. § 1983, and the relevant decisions of this Court.

Respondent submits that the disposition of this case is controlled by *O'Dell* v. *Espinoza*, *cert. granted*, 454 U.S. 1122 (1981), *dismissed for want of jurisdiction*, 456 U.S. 430 (1982) (per curiam). In *O'Dell*, the plaintiffs (respondents in this Court) had brought suit in Colorado state court under 42 U.S.C. §§ 1983 and 1985 seeking damages for the death of one Arthur Espinoza, who had been shot and killed by police officers. *Espinoza* v. *O'Dell*, 633 P.2d 455, 459 (Colo. 1981). The complaint asserted no claims under the state wrongful death act. The trial court dismissed the complaint on the ground that "a federal wrongful death remedy does not exist under 42 U.S.C. § 1983 or 1985 independent of state wrongful death remedies." *Id.* The Colorado Supreme Court reversed, holding that the trial court had misconstrued earlier Colorado case law upon which it had relied, that the complaint stated a § 1983 claim upon which relief could be granted, and that the trial court had therefore erred in dismissing that claim. *Id.* at 462. Accordingly, the supreme court remanded the case to the trial court for further proceedings. *Id.* at 469. This Court granted the defendants' petition for certiorari, but subsequently dismissed the case for want of jurisdiction:

> Because the Colorado Supreme Court remanded this case for trial, its decision is not final "as an effective determination of the litigation." Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

456 U.S. at 430 (citations other than to *Cox* omitted).

In this case, as in *O'Dell*, the state supreme court has simply ruled that the plaintiff/respondent is entitled to have her federal claims, which are the only claims she is asserting, heard and determined by a jury. Such a ruling, as the Court noted in *O'Dell*, does not fit into any of the *Cox* categories. Respondent therefore submits that the petition for certiorari should be dismissed for want of jurisdiction.

II. The Rhode Island Supreme Court Correctly Ruled That the Trial Judge Violated the Standard for Assessing the Evidence on a Motion for a Directed Verdict.

The question whether a state supreme court was correct in holding that a state trial judge improperly withdrew a case from a jury's consideration hardly seems sufficiently important to warrant this Court's attention, even when the case in question involves a federal civil rights claim. Be that as it may, the Rhode Island Supreme Court's ruling on this point was manifestly proper.

The standard applicable to a motion for a directed verdict is well established in Rhode Island. Both the trial court and the appellate court must view the evidence in the light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences that may be drawn in his favor, without weighing the evidence or assessing credibility. If the evidence, so viewed, reveals issues upon which reasonable minds could differ, the case must be submitted to the jury. *E.g.*, *Bitgood* v. *Allstate Insurance Co.*, 481 A.2d 1001, 1005 (R.I. 1984); *Montuori* v. *Narragansett Electric Co.*, 418 A.2d 5, 9 (R.I. 1980).[8]

The trial judge apparently approached this case with preconceived notions about the nature of public employment

[8] The federal standard is essentially the same. *See, e.g.*, *Hornyak* v. *Pomfret School*, 783 F.2d 284 (1st Cir. 1986); *Goldstein* v. *Kelleher*, 728 F.2d 32, 39 (1st Cir. 1984).

which led him to view respondent's conduct in an unfavorable light. He remarked that "Mr. Palma was the boss and in public employment, at times, public employees must work for petty dictators" (App. at 5a). He also stated that "[i]f this kind of conduct [*i.e.*, respondent's reporting Palma's malfeasance to his superiors] had happened in the private sector, the plaintiff would have been fired within a very short space of time, and no one in the private sector would have raised an eyebrow" (App. at 16a). Not only is it irrelevant whether a private employee, who does not have First Amendment rights vis-a-vis her employer, could be fired for the same conduct; in addition, this remark reveals a pro-employer bias that led the trial judge to draw inferences against respondent.

For example, with regard to the truthfulness of respondent's complaints against petitioner Palma, the trial justice stated that "[i]t became readily apparent to the Commissioners that most of these allegations were unfounded" (App. at 9a). There is absolutely nothing in the record to support this conclusion; to the contrary, "Palma admitted to the accuracy of many of the allegations" (544 A.2d at 580, App. at 25a). There is no evidence in the record of any factfinding by the commissioners on the truthfulness of respondent's charges. Viewing the evidence in the light most favorable to respondent, the only permissible inferences are that the charges were true and that the commissioners knew they were true but did not care.

The Rhode Island Supreme Court concluded its discussion of this issue as follows:

> The plaintiff testified that she reported Palma's activities because she believed that the housing authority and its tenants had been deprived of benefits and that his malfeasance constituted a matter of public concern. Palma admitted to the accuracy of many of the allegations. We conclude that the trial justice drew improper inferences and failed to extract the reasonable inferences

> that clearly supported plaintiff's position. In view of the testimony presented, *at minimum*, reasonable persons might form conflicting conclusions.

544 A.2d at 580, App. at 25a-26a (emphasis added). There is nothing in the petition to create even a shadow of a doubt concerning the correctness of this conclusion.

III. Respondent's Speech Obviously Addressed a Matter of Public Concern.

In cases of this type, in which a public employee claims that she was fired because of something she said, "[t]he threshold question . . . is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.' " *Rankin* v. *McPherson*, 107 S. Ct. 2891, 2896-97 (1987), *quoting Connick* v. *Myers*, 461 U.S. 138, 146 (1983). This is a question of law to be determined by the court, *Connick* v. *Myers*, 461 U.S. at 148 n.7, based upon "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

Allegations of abuse of office and theft of public resources by the director of a public agency are inherently matters of public concern. *See id.* at 148 & n.8 (plaintiff's complaints did not address matters of public concern because, *inter alia*, she did not seek to expose "wrongdoing or breach of public trust" on the part of her superior). As the Rhode Island Supreme Court put it:

> We focus particularly on Palma's admissions to plaintiff's allegations concerning the misuse of public funds and equipment. We are of the opinion that plaintiff's comments address a matter of public concern. Palma was empowered to allocate federal funds to eligible and qualified recipients. He breached his duty of trust to the taxpaying

> citizens who rely upon the integrity of civil servants selected to administer our system of government. We do not view the fact that Palma was candid about being dishonest and derelict in performing his duties as executive director as negating the validity of plaintiff's exercise of protected speech. [544 A.2d at 581, App. at 28a.]

Petitioners, like the trial judge, lay great stress on the fact that respondent spoke privately to the chairman of the board of commissioners about her concerns, rather than making a public announcement. (Pet. at 4, 9, 11; App. at 6a-7a, 14a.) Their argument that this deprives respondent's speech of First Amendment protection is patently frivolous. In its most recent opinion on this subject, this Court held that a statement made by a public employee in a private conversation with her boyfriend in a back office, which was overheard by another employee without the speaker's knowledge, was entitled to First Amendment protection. The Court expressly noted that "[t]he private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern." *Rankin* v. *McPherson*, 107 S. Ct. at 2898 n.11, *citing Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414-16 (1979) (*held*, First Amendment protection is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public").

Finally, petitioners say that respondent was fired, not because she reported Palma's malfeasance, but because she was insubordinate (Pet. at i, 9-10). This issue is not actually raised in the present posture of the case; the trial judge held that respondent's speech was not constitutionally protected as a matter of law (App. at 15a), so he had no need to decide, and did not decide, why she was fired (App. at 13a). Contrary to petitioners' suggestion (Pet. at 10), the Rhode Island Supreme Court expressed no opinion on this issue. Nevertheless, in

view of petitioners' harping on this point,[9] it is worth noting that whether respondent's constitutionally protected conduct was a substantial or motivating factor in the decision to terminate her is a question of fact for the jury. *Greminger* v. *Seaborne*, 584 F.2d 275, 278 (8th Cir. 1978). A reasonable person could conclude that respondent was fired because she brought Palma's misconduct to the attention of the board of commissioners, through its chairman. On petitioners' motion for a directed verdict, that inference must be drawn in respondent's favor.

IV. The Lincoln Housing Authority Is Liable Under 42 U.S.C. § 1983 for Ratifying Palma's Decision to Terminate Respondent's Employment.

The Lincoln Housing Authority's board of commissioners held a hearing at respondent's request to review her termination. After the hearing, which respondent and her counsel attended, the board took the matter under advisement. At a subsequent meeting, to which respondent and her counsel were not invited, the board voted to sustain Palma's decision. The Rhode Island Supreme Court correctly held that the authority is liable under § 1983 for this act of official policy.

The Court has addressed this subject twice in recent years. In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986),[10] the Court emphasized that a municipality[11] is liable not only for acts which it "has officially . . . ordered," but also for acts which it "has officially sanctioned." *Id.* at 480. The Court went on to explain that

---

[9] "[T]he [Rhode Island] Supreme Court, for some reason, ignored the crucial aspect of the case, which is the centerpiece for the reasons of the firing." (Pet. at 10).

[10] Although part II-B of the *Pembaur* decision was joined only by a plurality of the Justices, respondent relies upon part II-A of the decision, which was joined by a majority and is the opinion of the Court.

[11] The trial judge correctly held that the Lincoln Housing Authority is the equivalent of a municipality for § 1983 purposes. (App. at 3a.)

> a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. *If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of "policy" as that term is commonly understood.* More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Id. at 481 (emphasis added). Last Term, in *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915 (1988), Justice O'Connor, writing for a plurality, stated that the actions of municipal officials who have "final policymaking authority" will subject the municipality to § 1983 liability, that whether an official has such authority is a question of state law, and that the official must be "responsible under state law for making policy in *that area* of the city's business." *Id.* at 924. (emphasis in original). The plurality explained the basis for municipal liability in cases like this one as follows:

> [W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. at 926 (emphasis in original).

Here, the Rhode Island Supreme Court has held that "the board of commissioners retains control and *final authority*

over the executive director. The board ratified the decision by Palma to terminate plaintiff." 544 A.2d at 582, App. at 30a (emphasis added). Thus, the board has final policymaking authority for the Lincoln Housing Authority, and it is responsible under Rhode Island law for the authority's personnel policies. *Praprotnik* v. *City of St. Louis*, 108 S.Ct. at 924. The board approved Palma's decision to fire respondent. *Id.* at 926. Such ratification constituted "a course of action tailored to a particular situation and not intended to control decisions in later situations," and the decision to take that course of action was "properly made by [the housing authority's] authorized decisionmakers." *Pembaur* v. *City of Cincinnati*, 475 U.S. at 481. In these circumstances, the Rhode Island Supreme Court was clearly correct in holding that "the housing authority, as a properly constituted administrative body, is liable [under § 1983] for acts that it has officially sanctioned . . . ." (544 A.2d at 582, App. at 30a.)

Petitioners' only argument on this point is the astonishing assertion that respondent's § 1983 action against the authority is barred because her attempt to obtain judicial review of the board's decision, in the hope of overturning it on state law grounds, was dismissed because it was filed in the wrong court. (Pet. at 12-14; see App. at 11a.) Petitioners contend that this case is distinguishable from *Pembaur* and *Praprotnik* because the board's decision was "subject to judicial review in the state court system." (Pet. at 12.) Petitioners cite no authority for this proposition; nor could they, for the law is firmly settled the other way. This Court has repeatedly held in a variety of contexts that the exhaustion of judicial remedies available under state law is not a prerequisite to § 1983 relief. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 379-80 n.5 (1978); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437-39 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 245-52 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963).

Conclusion

For the reasons set forth in point I of this brief, respondent respectfully requests that the petition be dismissed for want of jurisdiction. Alternatively, for the reasons set forth in points II, III and IV, respondent respectfully requests that certiorari de denied.

By her attorneys,

MARTIN W. AISENBERG
Counsel of Record for Respondent
JONES & AISENBERG
72 South Main Street
Providence, Rhode Island 02903
(401) 274-4446

JOSEPH F. PENZA, JR.
OLENN & PENZA
1246 Chalkstone Avenue
Providence, Rhode Island 02908
(410) 351-5200